**CENTRAL PUGET SOUND**
**GROWTH MANAGEMENT HEARINGS BOARD**
STATE OF WASHINGTON

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| MASTER BUILDERS ASSOCIATION OF PIERCE COUNTY,<br><br>Petitioners,<br><br>v.<br><br>CITY OF BONNEY LAKE,<br><br>Respondent. | ) | **Case No. 05-3-0045**<br><br>***MBA (Bonney Lake)***<br><br>**ORDER ON DISPOSITIVE MOTION** |

## I. BACKGROUND

On November 4, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Master Builders Association of Pierce County (**Petitioner** or **MBA**). The matter was assigned Case No. 05-3-0045, and is hereafter referred to as *MBA v. City of Bonney Lake*. Board member Margaret Pageler is the Presiding Officer for this matter. Petitioners challenge the City of Bonney Lake's (**Respondent** or **City**) adoption of Ordinance No. 1157, which amended the Bonney Lake Municipal Code by increasing the parks impact fee from $1,500 to $2,522. Petitioners contend that the Ordinance is noncompliant with the Growth Management Act (**GMA**), inconsistent with the Bonney Lake Comprehensive Plan, and in violation of various provisions of chapter 82.02 RCW.

The Board issued its Notice of Hearing on November 9, 2005, setting the date for the prehearing conference and a tentative schedule for hearing the case.

On November 28, 2005, the Board received a notice of appearance from Lance M. Andree of Dionne and Rorick on behalf of the City of Bonney Lake. On December 2, 2005, the Board received the City's request to extend the deadline for submitting the City's Index by five days.

On December 5, 2005, the Board conducted the Prehearing Conference in the fifth floor conference room at the Board's Offices, Suite 2470, Union Bank of California Building, 900 Fourth Avenue, Seattle. The conference was convened at 10:00 a.m. and adjourned at approximately 10:45. Board member Margaret Pageler, Presiding Officer in this matter, conducted the conference, with Board members Ed McGuire and Bruce Laing in attendance. G. Richard Hill of McCullough Hill, PS, represented Petitioner, and Lance Andree of Dionne & Rorick represented Respondent. Tiffany Spears of the Master Builders Association of Pierce County also attended.

At the prehearing conference, the City indicated its intent to bring a comprehensive motion to dismiss the petition on jurisdictional grounds. The legal issues stated in the PFR and the case schedule were discussed in the context of this anticipated dispositive motion. With the consent of the parties, the Board established an expedited schedule for briefing and decision on the question of the Board's jurisdiction in the matter.

The Board issued its Prehearing Order on December 5, 2005.

On December 12, 2005, the Board received the City of Bonney Lake's Index.

The City's Motion to Dismiss for Lack of Jurisdiction **[City Motion**] was filed on December 12, 2005. The City Motion sought to dismiss the entire PFR with prejudice. On December 20, 2005, the Board received Master Builders Association's Response to Motion to Dismiss [**MBA Response**]. On January 3, 2006, the Board received City's Rebuttal to Petitioners' Response to City's Motion to Dismiss [**City Rebuttal**]. Neither party attached any exhibits to its brief.

## II. DISCUSSION AND ANALYSIS

The Challenged Action

The Petition for Review in this matter challenges Bonney Lake's Ordinance No. 1157. Ordinance No. 1157 makes a single change to Bonney Lake Municipal Code section 19.06.050, changing the parks impact fee from $1,500 to $2,522. The Ordinance contains a single "whereas" clause:

> Whereas, the Council desires to increase the parks impact fee in order to provide adequate funding for planned park improvements necessitated by new growth in the City;

In challenging this Ordinance, Petitioner Master Builders Association asserts that the fee increase was imposed "to pay for an eminent domain judgment against the City in connection with an addition to Allan Yorke Park that the City acquired in 2004." PFR at 3. Petitioners allege that Allan Yorke Park is an existing facility; its expansion is not needed to serve new development nor necessary to mitigate direct impacts of new development. *Id*. Further, Petitioners assert that the Allan Yorke Park expansion is not called for in the Capital Facilities element of the City's Comprehensive Plan. *Id*. Petitioners have provided the Board with no documents or references to the record to support these assertions. The Ordinance itself contains no reference to Allan Yorke Park.[1]

[1] Ordinance No. 1157 reads in full as follows:

AN ORDINANCE OF THE CITY OF BONNEY LAKE, PIERCE COUNTY, WASHIGTON, AMENDING CHAPTER 19.06 OF THE BONNEY LAKE MUNICIPAL CODE AND ORDINANCE NO. 1018 RELATING TO PARKS IMPACT FEES.

WHEREAS, the Council desires to increase the parks impact fee in order to provide adequate funding for planned park improvements necessitated by new growth in the City;

Legal Issues

The Legal Issues presented in the PFR are as follows:

> *Legal Issue No. 1:* Whether Ordinance No. 1157 is inconsistent with the City's Comprehensive Plan in violation of RCW 36.70A.090 and 36.70A.120?
>
> *Legal Issue No. 2:* Whether Ordinance No. 1157 violates the requirements of RCW 82.02.020 by virtue of charging impact fees unrelated to the impacts of new development?
>
> *Legal Issue No. 3:* Whether Ordinance No. 1157 is invalid under RCW 82.02.050 because it imposes fees that are not limited to the proportionate share of the cost of new facilities required to serve the new development; it imposes fees that are not reasonably related to impacts of the new development; and it imposes fees for purposes that are not contemplated or properly documented in the City's Comprehensive Plan?
>
> *Legal Issue No. 4:* Whether Ordinance No. 1157 is invalid because it fails to make an adjustment for past and future non-impact fee payments made by new development and because it will use fees to make up for existing system improvement deficiencies, in violation of RCW 82.02.060?

Positions of the Parties

Bonney Lake's Motion to Dismiss asserts that the Board does not have jurisdiction over challenges to impact fees enacted under chapter 82.02 RCW. The City argues that the statutory grant of jurisdiction to the Growth Management Hearings Boards is narrow, and that the Central Board, in particular, has for over a decade consistently held that review of impact fees, as authorized in chapter 82.02 RCW, is not within this limited grant. City Motion, at 1-3, citing *Robison, et al., v. City of Bainbridge Island*, CPSGMHB Case No. 94-3-0025c, Order Granting BISD's Dispositive Motion re: Jurisdiction (Feb. 24, 1995); *Terri and Randi Slatten v. Town of Steilacoom*, CPSGMHB Case No. 94-3-0028, Order

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NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF BONNEY LAKE, WASHINGTON, DO ORDAIN AS FOLLOWS:

**Section 1**. BLMC section 19.06.050 and the corresponding portion of Ordinance No. 1018 Section 1 are hereby amended to read as follows:

**19.06.050 Impact fees and establishment of service area**

A. Subject to the provisions of BLMC 19.06.060, the parks impact fee assessed pursuant to this chapter shall be $1,500 $2,522.

B. The impact fee set out in subsection A of this section shall be updated annually at a rate adjusted in accordance with the Engineering News Record (ENR) Construction Cost Index for the Seattle area, using a June-July annual measure to establish revised fee schedules effective July 1 of the current year.

C. For the purpose of this chapter, the entire city shall be considered one service area.

**Section 2.** This Ordinance shall take effect thirty (30) days after its passage, subject to prior approval by the Mayor and prior publication for five days as required by law.

Dismissing Legal Issue No. 10 (Feb. 24, 1995) (dismissing challenge to impact fees *sua sponte*); *South Bellevue Partners Limited Partnership and South Bellevue Development, Inc. v. City of Bellevue*, CPSGMHB Case No. 95-3-0055, Order of Dismissal (Sep. 20, 1995); and the Western Washington Growth Management Hearings Board decision in *Achen v. City of Battleground,* WWGMHB Case No. 99-2-0040, Final Decision and Order (May 16, 2000).

The City contends that MBA's bare assertion that the City's parks impact fee is inconsistent with its comprehensive plan is insufficient to invoke the Board's jurisdiction, *first*, because imposition of impact fees is not a "development regulation," and thus does not trigger the consistency requirement, and, *second*, because limitations on local government use of impact fees are set forth in chapter 82.02 RCW, not in the GMA. City Motion, at 7-8.

The Supreme Court decision in *James v. Kitsap County*, 154 Wn.2d 574, 115 P.3d 286 (2005), does not require a different result, according to the City. The City asserts:

> [T]he fact that the impact fees were considered in *James* to be so inextricably linked with a building permit as to qualify as review of a "land use decision" does not alter the fact that the ordinance imposing such fees was passed under the City's authority, pursuant to Chapter 82.02 RCW, to raise revenues for capital projects, not as a part of the City's duty to plan under the GMA.

City Motion, at 5.

In response, Petitioner MBA asserts that its first legal issue "falls squarely within the Board's jurisdiction" as it alleges that the City is not in compliance with GMA requirements. *Citing* RCW 36.70A.280; WAC 242-02-220. Petitioner states:

> Accordingly, because RCW 36.70A.090 and 36.70A.120 requires land use regulations and City activities and capital budget decisions to be consistent with the City's Comprehensive Plan, and because the Ordinance is inconsistent with the City's Comprehensive Plan, the Ordinance is invalid.

MBA Response, at 2-3.

Secondly, MBA argues that by virtue of the Washington Supreme Court decision in *James*, the Board should reconsider its previous rulings that it lacks jurisdiction over claims that impact fees violate RCW 82.02.020. MBA contends that *James* stands for the proposition that impact fees are land use regulations which must be consistent with the local jurisdiction's GMA capital facilities plan. MBA Response, at 5. MBA reads *James* as establishing an "integral relationship between impact fees and GMA requirements" and "call[ing] into question the Board's prior determination that it lacks jurisdiction over impact fees." *Id*. MBA cites the following passage from the Court's opinion:

> In 1990 and 1991, the legislature enacted the GMA, which provided that counties containing either a high population or a high population growth, meeting specific criteria, were required to conform with its provisions. RCW 36.70A.040. The legislature provided the elements necessary for counties' comprehensive plans to comply with the GMA in RCW 36.70A.070, which includes a capital facilities plan element. RCW 36.70A.070(3).
>
> One of the principal goals of the GMA is to "ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards." RCW 36.70A.020(12). To effectuate this goal, "counties, cities, and towns that are required or choose to plan under RCW 36.70A.040 are authorized to impose impact fees on development activity as part of the financing for public facilities. . . ." RCW 82.02.050(2). An "impact fee," for the purposes of chapter 82.02 RCW, is defined as "a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development. . . ." RCW 82.02.090(3).

*James, supra,* 154 Wn.2d at 581-582.

In rebuttal, the City points out that Growth Management Hearings Boards have consistently refused jurisdiction of challenges to local decisions made under the authority of statutes other than those specifically named in RCW 36.70A.280, even if brought as challenges to consistency with the local comprehensive plan. City Rebuttal, at 4.

Further, the City contends that MBA has misconstrued the holding in *James*.

> *James* did not reject the characterization of impact fees as a "revenue decision." The court simply held that given the purpose and language of LUPA, impact fees imposed as a condition of granting a building permit meet the broad definition of a "land use decision" under LUPA (a definition that is wholly distinct from this Board's jurisdictional analysis). This holding does not support the conclusion that impact fees are now "development regulations" within the board's jurisdiction. More importantly, the *James* analysis does nothing to alter the fact that impact fees are imposed under the authority of a different statute and are therefore beyond the express, limited grant of jurisdiction in RCW 36.70A.280….
>
> All *James* establishes is that a challenge to the imposition of impact fees on a particular project is a challenge to a "land use decision" which must be brought in conformance with the procedural requirements of LUPA.

City Rebuttal, at 6-7.

Board Discussion

The Board's analysis begins with its jurisdictional authority provided in RCW 36.70A.280(1):

> A growth management hearings board shall hear and determine only those petitions alleging either . . . [t]hat a state agency, county or city planning under this chapter is not in compliance with the requirements of this chapter [GMA], chapter 90.58 RCW [Shoreline Management Act] as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW [SEPA] as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW ….

RCW 36.70A.290(2) further specifies matters that may be appealed to the Board:

> All petitions relating to whether or not an adopted comprehensive plan, development regulation or permanent amendment thereto, is in compliance with the goals and requirements of this chapter [GMA] or chapter 90.58 [SMA] or 43.21C RCW [SEPA] …

The Washington Supreme Court has called this "a very limited power of review." *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 867, 947 P.2d 1208 (1997).

The Board has consistently held that it does not have jurisdiction over challenges to impact fees under chapter 82.02 RCW, first, because chapter 82.02 RCW is not within the GMA scope of review in RCW 36.70A.280, and second, because impact fees are not development regulations.[2] That settled rule was reinforced by the reasoning of the Court of Appeals in *New Castle Investments v. City of La Conner*, 98 Wn.App. 224, at 235-36, 989 P.2d 569 (1999). There the court held that transportation impact fees adopted under chapter 82.02 RCW are not land use controls or development regulations: "they are another source of revenue for improvements that benefit the public in general, and they are not intended to regulate the particular development." 98 Wn.App. at 236.

Petitioners here propose that the Supreme Court's ruling in *James* alters that analysis. In *James*, the Supreme Court determined that Kitsap County's imposition of impact fees was a "land use decision" which must be appealed under the Land Use Petition Act [LUPA], chapter 36.70C RCW. While the *James* decision discusses the linkage between

[2] *See e.g., Association to Protect Anderson Creek, et al., v. City of Bremerton*, CPSGMHB Case No. 05-3-0053c, Order on Dispositive Motions (Oct. 18, 1995), at 10; *Robison, et al., v. City of Bainbridge Island*, CPSGMHB Case No. 04-3-0025c, Order Granting Dispositive Motion (Feb. 24, 1995); *see also, Achen v. City of Battleground*, WWGMHB Case No. 99-2-0040, Final Decision and Order (May 16, 2000); *Properties Four v. City of Olympia*, WWGMHB Case No. 95-2-0069, Final Decision and Order (Aug. 22, 1995).

chapter 82.02 RCW and the public facilities element of GMA comprehensive plans, the Court's characterization of impact fees as "land use decisions" does not bring them within the purview of Board review.

The *James* holding was that because impact fees are land use decisions concerning development permits, the procedural requirements of LUPA apply. Land use decisions in the development permit arena, subject to LUPA review in Superior Court, are beyond the Board's jurisdiction. *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn2d 169, 179, 4 P.3d 123 (2000) ("pursuant to RCW 36.70A.280 and .290, a GMHB does not have jurisdiction to hear a petition that does not involve a comprehensive plan or development regulation under the GMA"). *See also Citizens for Mount Vernon, supra; Hanson, et al., v. King County*, CPSGMHB Case No. 98-3-0015, Order Granting Dispositive Motions (Sep. 28, 1998), at 4-5.

The Supreme Court in *Wenatchee Sportsmen* explained that there are two mutually-exclusive routes for challenge of a "land use decision:"

> A party must initially appeal a land use decision of the kind involved here to either a GMHB or to superior court; the GMA and LUPA determine which forum is the exclusive one to consider a party's grievance. If a GMHB does not have jurisdiction to consider a partition, it must be filed in superior court under LUPA. The GMA in turn limits the kinds of matters that GMHBs may review: "A growth management hearings board shall hear and determine only those petitions alleging … that a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter …" RCW 36.70A.280(1)(a). Another provision of the GMA spells out in greater detail the subject matter of each petition: "All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter … must be filed within sixty days after publication …" RCW 36.70A.290(2). From the language of these GMA provisions, we conclude that unless a petition alleges that a comprehensive plan or a development regulation or amendments to either are not in compliance with the requirements of the GMA, a GMHB does not have jurisdiction to hear the petition.

*Wenatchee Sportsmen*, 141 Wn.2d at 178.

The Board concludes that it has no authority to review the City of Bonney Lake's increase in its parks impact fee under chapter 82.02 RCW.

**Legal Issues 2, 3, and 4 allege violation of RCW 82.02.020, 050, and 060, respectively. The Board finds and concludes that it has no jurisdiction to review the challenge to Ordinance No. 1157 alleging noncompliance with chapter 82.02 RCW. Therefore Legal Issues 2, 3, and 4 are dismissed.**

Legal Issue No. 1 is phrased as a GMA issue: "Whether Ordinance No. 1157 is inconsistent with the City's Comprehensive Plan in violation of RCW 36.70A.090 and 36.70A.120?"

RCW 36.70A.090 provides:

> A comprehensive plan should provide for innovative land use management techniques, including but not limited to, density bonuses, cluster housing, planned unit developments, and the transfer of development rights.

Section .090 encourages the inclusion of innovative techniques in a jurisdiction's comprehensive plan. It imposes no GMA duty. Additionally, an increase to an impact fee (which is the substance of Ordinance No. 1157) does not affect the contents of the City's comprehensive plan at all. Consequently, the provisions of .090 are simply not applicable to the City's action in this case. The Board will therefore dismiss MBA's challenge to Ordinance No. 1157 based on alleged noncompliance with RCW 36.70A.090.

RCW 36.70A.120 provides:

> Each county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities and make capital budget decisions in conformity with its comprehensive plan.

Petitioner asks the Board to determine whether Ordinance No. 1157 is a "capital budget decision in conformity with [the City's] comprehensive plan." The Ordinance on its face merely increases the amount of the parks impact fee. Nothing in the text of the Ordinance compels the conclusion that the increased fee or the money raised will be used inconsistently with the City's comprehensive plan.

Petitioner's allegations of inconsistency with the plan all require the Board to look beyond the face of the Ordinance and, in fact, to analyze the fee increase under the impact fee criteria spelled out in RCW 82.02.050(4).[3]

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[3] RCW 82.02.050(4) provides:

> (4) Impact fees may be collected and spent only for the public facilities defined in RCW 82.02.090 which are addressed by a capital facilities plan element of a comprehensive land use plan adopted pursuant to the provisions of RCW 36.70A.070. . . . [C]ontinued authorization to collect and expend impact fees shall be contingent on the county, city, or town adopting or revising a comprehensive plan in compliance with RCW 36.70A.070 and on the capital facilities plan identifying:
> (a) Deficiencies in public facilities serving existing development and the means by which existing deficiencies will be eliminated within a reasonable period of time; and
> (b) Additional demands placed on existing public facilities by new development; and
> (c) Additional public facility improvements required to serve new development. . . .

Essentially, Petitioner is asking the Board to enforce the requirements of chapter 82.02 RCW in the guise of a GMA consistency challenge. This the Board declines to do. The Board will therefore dismiss the allegations of Legal Issue No. 1 based on non-compliance with RCW 36.70A.120.

**The Board finds and concludes that it has no jurisdiction to decide the challenge to the City's parks impact fee increase posed as noncompliance with RCW 36.70A.120 and RCW 36.70A.090. Legal Issue No. 1 is dismissed.**

## III. ORDER

Having considered the PFR, the filings of the parties, case law, the Board's prior Orders and the GMA, and the Board's rules, and having deliberated on the matter, the Board **ORDERS:**

- The matter of *Master Builders Association of Pierce County v. City of Bonney Lake,* CPSGMHB Case No. 05-3-0045 is **dismissed with prejudice**.

- All scheduled hearings are **cancelled** and this matter is **closed**.

So ORDERED this 12th day of January 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Bruce C. Laing, FAICP
Board Member

_____
Edward G. McGuire, AICP
Board Member

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Margaret A. Pageler
Board Member

Note: This Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.[4]

[4] Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office.

RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)